

At the Pre-Hearing Conference held on November 8, 2001, the Pre-Hearing Officer addressed the Motions to Compel specific discovery requests. The parties announced that the only matter that remained in dispute was Interrogatory No. 36, in which AT&T asked for flow-through rates for each state in BellSouth's region. During the Pre-Hearing Conference, AT&T asserted that a KPMG witness who did the flow-through evaluation in Georgia had testified that BellSouth had the capability to provide state-specific flow-through reports and, according to AT&T, that BellSouth's flow-

through reports are a computer program that runs on a database which has flags in it to identify the state referenced.¹ AT&T explained that this information would either confirm or contradict the claim that BellSouth's ordering systems perform substantially the same from state to state for flow-through purposes.² BellSouth responded that it did not produce flow-through reports on a state by state basis and was unsure whether it could.³ At the November 8th Pre-Hearing Conference, BellSouth was ordered to file by November 13, 2001 a Response to AT&T Interrogatory No. 36 or an explanation describing why such a Response is not technically feasible. BellSouth failed to make such a filing.

On November 14, 2001, the Pre-Hearing Officer issued an *Order Resolving Procedural Motions*. For the reasons set forth in the November 14, 2001 Order, the Pre-Hearing Officer ordered BellSouth to provide the state-specific flow-through data requested by AT&T no later than Tuesday, November 20, 2001. The Pre-Hearing Officer stated:

Without a state specific flow-through report, it is impossible to determine if the performance from one or more states provides performance at a level sufficient to make up for any state that may not be performing well enough to meet satisfactory standards. This is particularly important when one considers the controversy surrounding Direct Order Entry (DOE) and Service Order Negotiation System (SONGS). According to BellSouth these systems have no material difference in functionality or reporting. This information could prove important in determining the regionality of BellSouth's OSS.

In addition, BellSouth produces state-specific reports on firm order confirmation ("FOC") timeliness and rejection notice timeliness which are further broken down into totally mechanized, partially mechanized and manual. This further confirms that BellSouth has the state specific flow

¹ *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (hereinafter *OSS Docket*) (Transcript of November 8, 2001 Pre-Hearing Conference), p. 54.

² *Id.*, p. 56.

³ *Id.*, pp. 54, 57.

through information requested by AT&T. However, there is no indication either by AT&T or in BellSouth's publicly available *Monthly State Summary* of its wholesale performance that such flow through information is available or can be generated by the type of interface as requested by AT&T. Therefore, BellSouth is only required to provide the requested information by category but not broken down by the type of interface.⁴

BellSouth's Motion to Clarify

In its Motion to Clarify, BellSouth seeks to have the Pre-Hearing Officer clarify the November 14, 2001 Order "to conform to the decision rendered by the Hearing Officer on November 8th" and accept "BellSouth's supplemental response to Item 36."⁵ BellSouth provides an excerpt of the transcript from the November 8, 2001 Pre-Hearing Conference in support of its position that the November 14, 2001 Order needs clarification. While BellSouth emphasized what the Pre-Hearing Officer ordered at the Pre-Hearing Conference, BellSouth ignored that part of the Pre-Hearing Officer's order as emphasized below:

DIRECTOR GREER: Okay. Well, let's not argue the merits of the case. We're on a procedural issue at this point. AT&T states in its matrix that BellSouth, therefore, should either produce the requested data or explain why producing such data is not technically feasible. That is going to be my order. **You will either produce the data, or you will produce – you should either produce the requested data or explain in writing in a filing before us why producing such data is not technically feasible,** and then we will have to give – Mr. Hopkins then is free to open up whatever discussions he wants to about whether it evidences the regionality or not, and you-all can go back to the same argument you just had here and debate that before the Directors.

MR. HOPKINS: Thank you, sir.

DIRECTOR GREER: **That filing shall be in November the 13th as well.** And if you can produce the data and you need a little extra time, we'll –I'll – I think that will do. That's it. Okay. (Emphasis added)⁶

⁴ *Order Resolving Procedural Motions* (November 14, 2001), pp. 24-25.

⁵ BellSouth's *Motion to Clarify Order Regarding AT&T Interrogatory No. 36*, (November 20, 2001), p. 4.

⁶ *OSS Docket* (Transcript of November 8, 2001 Pre-Hearing Conference), pp. 63-64.

It is clear from the transcript of the November 8, 2001 Pre-Hearing Conference that (1) BellSouth was required to “either produce the requested data or explain in writing in a filing before (the Authority) why producing such data is not technically feasible” and (2) BellSouth was required to produce the data or make such a filing by “November the 13th.” November 13 came and went without BellSouth complying with the Pre-Hearing Officer’s order. The Pre-Hearing Officer issued his *Order Resolving Procedural Motions* on the following day, November 14, 2001, requiring BellSouth “to provide no later than Tuesday, November 20, 2001, the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth’s region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined.”⁷

BellSouth asserts in its Motion to Clarify that it did not receive the Pre-Hearing Officer’s November 14, 2001 Order until November 16, 2001, after it had filed a supplemental response to Item No. 36 on November 16, 2001. Notwithstanding, BellSouth not receiving the Order until November 16, BellSouth’s supplemental response was untimely filed based on the Pre-Hearing Officer’s order issued verbally at the November 8, 2001 Pre-Hearing Conference. Any reliance BellSouth places on not receiving the November 14 Order is irrelevant as to the late filing of the supplemental response.

Furthermore, even if BellSouth had timely filed its supplemental response on November 13, such response remains inadequate and not in compliance with the Pre-

⁷ Order Resolving Procedural Motions (November 14, 2001), p. 27.

Hearing Officer's order at the November 8th Pre-Hearing Conference. If BellSouth did not produce the requested data, BellSouth was required to file a written explanation as to "why producing such data is not technically feasible."⁸ BellSouth's supplemental response to Item No. 36 does not provide an explanation as to why it is not technically feasible to produce the requested information. In fact, BellSouth responds, in part,

BellSouth has not done an in-depth investigation to ascertain the technical feasibility, cost, or implementation effort associated with the development of state specific reports as requested by AT&T. BellSouth has determined in our preliminary high-level analysis that data collection such as Fatal Rejects, as a category, can only be counted in a regional format. In addition, if technical feasibility could be determined, the development effort to implement such a measurement would require considerable programming effort and it's associated costs.⁹

Conclusion

For the above stated reasons, the Pre-Hearing Officer finds that there is no need to clarify his November 14, 2001 *Order Resolving Procedural Motions* and therefore, denies BellSouth's Motion to Clarify. The Pre-Hearing Officer recognizes that BellSouth did not receive the November 14th Order until November 16, 2001 and therefore, does not find BellSouth in violation of that Order for its failure to provide the requested information by November 20, 2001. Notwithstanding, the Pre-Hearing Officer finds that BellSouth did not comply with the order issued at the November 8, 2001 Pre-Hearing Conference. The Pre-Hearing Officer further determines that BellSouth must comply with the November 14, 2001 Order and requires BellSouth to comply with that order by producing the requested data no later than **12:00 Noon on Thursday, November 29, 2001.**

⁸ *OSS Docket*, (Transcript of November 8, 2001 Pre-Hearing Conference), p. 63.

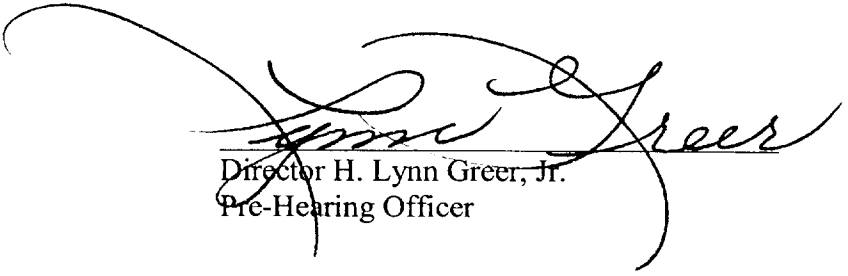
⁹ *BellSouth's Non-Proprietary Supplemental Responses to Interrogatories and Requests for Production* (November 16, 2001), Supplemental Item No. 36, page 2 of 2.

IT IS THEREFORE ORDERED THAT:

1. BellSouth's *Motion to Clarify Order Regarding AT&T Interrogatory No. 36* is hereby denied.

2. BellSouth is ordered to provide no later than **12:00 Noon on Thursday, November 29, 2001** the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth's region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).

3. In the event that BellSouth fails to comply with this Order, the Pre-Hearing Officer shall refer this matter to the Directors for the purpose of determining if sufficient cause exists to issue sanctions against BellSouth for failure to comply.



Director H. Lynn Greer, Jr.
Pre-Hearing Officer



K. David Waddell, Executive Secretary